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# Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

*Petitioners*,

—v.—

JOHNSON CONTROLS, INC.,

*Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS BY AMERICAN CIVIL LIBERTIES UNION and the AMERICAN CIVIL LIBERTIES UNION-WISCONSIN; AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN FRIENDS SERVICE COMMITTEE; ASIAN IMMIGRANT WOMEN ADVOCATES; BOSTON WOMEN'S HEALTH BOOK COLLECTIVE; CENTER FOR CONSTITUTIONAL RIGHTS; CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH; COAL EMPLOYMENT PROJECT; COALITION OF LABOR UNION WOMEN;**

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## INTEREST OF AMICI CURIAE

This brief amici curiae is submitted pursuant to Rule 37.3 of the Rules of this Court and is filed in support of Petitioners.1/

Amici are organizations and individuals concerned about the pervasive policies of employers such as Johnson Controls. Such policies assume that fertile women are always potentially pregnant, require women to be sterilized to qualify for employment, and deny fertile women important job opportunities, all in the name of fetal health. Amici are knowledgeable about the nature and extent of such policies and the respects in which they actually undermine the health of women, children and men. Some amici join

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1/ Letters of consent of the parties are being filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

this brief to describe how policies like the one at issue here have affected them and their families.2/

## SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended ("Title VII") was intended to eradicate employment discrimination based on sex, including pregnancy. 42 U.S.C. §2000e(k). Congress' actions were based, in large part, on a recognition that unemployment and occupational segregation have serious consequences for women and families, especially children. As a result, Congress intended to strike at the "full range" of such practices. (Point I)

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2/ Attached as an appendix to this brief are statements of interest for the amici. Some of the individual amici have requested anonymity to protect their privacy and because they fear reprisal by their employers. They are identified as Jane Does 1-10 and John Does 1 and 2.



The facts upon which Congress relied remain true today. Specifically, Congress recognized that women's employment is critical to the welfare of families (Point IA) that serious health consequences are associated with denial of employment opportunities (Point IB), and that stereotypes about women limit those opportunities. (Point IC) Congress concluded that it was essential to make the right to work compatible with the right to have a family. (Point ID)

Congress thus expressed the commitment to full employment rights in unequivocal language. (Point IIA). The limited exception to the statutory mandate does not apply here. In particular, costs of employing women or improving working conditions do not justify a policy that excludes women from employment

opportunities. (Point IIB) The lower courts that have attempted to craft new approaches to the statute's requirement have impermissibly distorted the statutory scheme. (Point IIC) Enforcement of Title VII will return occupational health and safety determinations to federal regulatory authorities, whose efforts to improve workplace conditions have been undermined by the opinion of the court below.

## ARGUMENT

### Introduction

This case presents the question of whether Title VII prohibits an employment practice that restricts opportunities for women who are willing and able to work because of the chance that they may become pregnant and that a workplace hazard may harm the fetus. Judge Easterbrook, dissenting in the court below, considered



it "likely the most important sex discrimination case in any court since...Congress enacted Title VII" and predicted that the decision, unless reversed, could limit women's access to as many as "20 million industrial jobs." International Union, UAW v. Johnson Controls, Appendix to the Petition For Certiorari (hereinafter "Pet. App.") at 99a and 100a.

This is no exaggeration. In a variety of forms, these policies are already pervasive; they are most pronounced in industries historically closed to women, where high wages and good benefits make jobs particularly attractive to unskilled workers with few other options.3/ For many

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3/ See, Paul, et al., Corporate Response to Reproductive Hazards in the Workplace: Results of the Family, Work and Health Survey, 16 Am. J. Occ. Med. 267 (1989) reporting a higher incidence of (continued...)

women and men, such employment offers the only alternative to poverty.

The court of appeals' characterization that women take these jobs "to better the family's station in life," Pet. App. at 51a, understates the significance of this kind of employment to the well-being of women and their families. The stories of women and men affected by these discriminatory policies offer an insight into the reality of life outside the courtroom walls and graphically illustrate the profound personal and economic effects of policies requiring women to choose between their jobs and their fertility.

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3/ (...continued)
discriminatory policies in male intensive industries. See generally, Committee on Education and Labor, A Report on the EEOC, Title VII and Workplace Fetal Protection Policies in the 1980s, 101st Cong., 2d Sess. (Comm. Print 1990) (hereinafter "House Committee Report").



Most of these women are deeply concerned about the health and well-being of their families. These are not women who "might somehow rationally discount" the risks of work and selfishly sacrifice the health of their children for mere "financial reward." Pet. App. at 51a and 21a. They work because they must, at the best jobs they can get.

> [When] I began working in the foundry of an automobile plant. . . I had one small child and when my husband and I separated, I needed to find a job with good salary and benefits. The plant was the only place in the area that offered both. . . . If I lost my job I would never find anything comparable to what I now have. A woman who is in her late thirties as I am would probably only be able to get a job as a sales clerk in the shopping mall or as a waitress in a fast food restaurant. (A-71-72)4/

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4/ References are to Appendix pages at which individual Statements of Interest are set forth.

[After] I quit school in the 10th grade. . . I worked for five years as a sales clerk. . . [at] minimum wage. . . . [When] I heard that they were hiring women at [the] plant I applied for the job because it offered a much better salary and better benefits. . . A-65-66

* * *

I am the major supporter of my family. My husband is presently laid off from his job. My family depends on my salary and benefits, and it would be disastrous for us if I lost my job before my husband is called back to work. A-74

Their counterparts are men who are plagued by concerns about the effects of workplace hazards on themselves and their future children.

> In 1978 or 1979 [my brother] was tested and had a very high blood lead level. In 1980 or 1981 he collapsed on the job melting ore (iron) in the melting area. . . . [He] was forty four years old when he had the heart attack, and . . . I strongly believe [it] may very well have been caused by the many years he spent working in the high lead melting area and nearby areas. A-46



* * *

> I have worked in the automotive industry for twenty-five years . . . . Only three of my five children are alive. . . . I am convinced that my exposure to hazardous substances in the workplace was the cause of the two deaths and possibly the premature birth of [my] twins. . . . A-63

Both men and women have little information and fewer choices.

> You might say that we're sort of caught between a rock and a hard place. Some men prefer to ignore the health issue and just gamble that they or their children won't get sick. A-65

* * *

> I decided to have the sterilization because I needed to keep my job. . . . I knew that my husband and I were going to separate, and that I would have to support myself and my son. In addition, I had always helped my parents who were elderly and infirm. . . . I was 26 years old when I was sterilized. A-52-53

Johnson Controls has elected to disregard the risks of lead to male workers and to "protect" women by denying them jobs instead of improving workplace

conditions.[5] In validating this approach, the decision below is inconsistent with the conclusions of federal health authorities that men and women require an equivalent degree of workplace protection to safeguard their own health and that of future generations. It also conflicts with regulations adopted pursuant to the Occupational Safety and Health Act, 29 U.S.C. §651, et seq. ("OSH Act") that require employers to protect both men and women planning families at the level of

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5/ Johnson Controls' assertion that hazardous conditions cannot be improved is palpably untrue, as federal regulators and public health experts have found. See Brief amici curiae of the American Public Health Ass'n, et al. ("APHA Brief"). If Johnson Controls could not comply with occupational health standards, it would be required to apply to the Secretary of Labor for a variance. 29 U.S.C. §655(6)(A). See also General Electric Co. v. Secretary of Labor, 576 F.2d 558 (3d Cir. 1978).



exposure at which Johnson Controls excludes women.[6]

The lower court assumed that women will make inappropriate decisions about work and childbearing; it would defer to "an employer [who] adopts an employment policy designed to address a difficult societal problem," Pet. App. at 49a, even though that policy offers neither workplace safety for men nor equity for women. The court thus ignored not only the Congressional mandate expressed in OSHA, but also the conclusions Congress reached in enacting and amending Title VII, that unemployment and underemployment pose serious risks for women and their families, and that women

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6/ Final Standard for Occupational Exposure to Lead, 29 C.F.R. §1910.1025 (1989). OSHA's Lead Standard and subsequent regulatory actions regarding lead are discussed extensively in the APHA Brief.

cannot be forced to forego childbearing in order to work.

## I. The Objectives Congress Sought To Achieve When It Adopted And Amended Title VII Are Directly Threatened By Policies Such As Johnson Controls'

Title VII prohibits intentional sex discrimination in employment unless sex is a bona fide occupational qualification ("BFOQ"). 42 U.S.C. §2000e-2(e)(1). Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). Cf. Price Waterhouse v. Hopkins, __U.S. __, 109 S.Ct. 1775 (1989) (mixed motive case). In response to Gilbert v. General Electric, 429 U.S. 677 (1976), holding that pregnancy-based discrimination was not per se gender-based discrimination within the meaning of Title VII, Congress enacted the Pregnancy Discrimination Act ("PDA") "to make plain that, under Title VII. . . discrimination



based on pregnancy, childbirth and related medical conditions is discrimination based on sex. Thus, the bill defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences peculiar to women[.]"[7] The PDA further "illustrate[s] how discrimination against pregnancy is to be remedied."[8] Women, whether or not pregnant, are entitled to employment opportunities based solely on the "ability or inability to work." 42 U.S.C. §2000e(k).

Because women are as capable of producing batteries as men are, the plain

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7/ Comm. on Labor and Human Resources, Legislative History of the Pregnancy Discrimination Act of 1978, 96th Cong., 2d Sess. 40-41 (Comm. Print. 1979) (hereinafter "Legis. Hist.") (emphasis supplied).

8/ California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 285 (1987). (hereinafter "Cal Fed")

language of Title VII, as amended by the PDA, clearly prohibits Johnson Controls' policy, regardless of whether that policy is construed as discriminating against all women or potentially pregnant women.9/ As the extensive legislative record underlying the PDA reveals, Title VII was intended to redress "the full range of discriminatory practices which have adversely affected [women's] status in the work force."10/

In particular, Congress recognized that women's employment is critical to the welfare of women and families, that denial of access to employment opportunities

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9/ The court below concluded that the policy did not apply to all women, but affected only those capable of bearing children. E.g., Pet. App. at 43a. The terms of the policy, however, draw explicit gender based lines. All women (but no men), for example are required to submit medical evidence of sterility as a condition of employment.

10/ Legis. Hist., supra note 7 at 63. (emphasis supplied).



results in a lower standard of living with devastating consequences, and that sex-based stereotypes limit women's employment opportunities. In consideration of both the equity of women's claim to equal employment opportunity and the practical necessity of work for many women, Congress expressly endorsed the proposition that no woman should have to sacrifice the right to work in order to have a family, nor sacrifice the right to have a family in order to work.

As demonstrated below, policies like Johnson Controls' directly threaten the principal goals to be achieved by Title VII's prohibitions on sex discrimination. A construction of the statute permitting such policies would frustrate its very purposes.

### A. Women's Employment Is Critical To The Welfare Of The Family.

Policies that deny women employment reflect an assumption that women can forego employment without serious consequences, but the facts are otherwise. In both single parent and dual wage earner households, women's employment is critical to the maintenance of many families, and the loss or reduction of a woman's income will have devastating effects, as Congress acknowledged:

> In many low-income families the financial support provided by the mother has become essential for the families' economic survival. . . . In an increasing number of middle-income families the support and the well being of the family has become inextricably tied to the income generated by females.[11/]

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11/ Legis. Hist., supra note 7 at 127.



In dual wage earner families, full-time working wives contribute an average of 37.6% of the family income, and the poorer the family, the more critical the wife's contribution. In families in which the total income is less than $15,000, that contribution averages more than half.[12/] In 1984, for example, poverty was 35% lower than it would have been had wives not worked.[13/]

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12/ Supporting A Family: Providing the Basics: Hearing Before the House Comm. on Children, Youth, and Families, 98th Cong. 1st Sess., 39-40 (1983)(Statement of Diana Pearce)(hereinafter "Supporting A Family"). Among black couples, the median family income of those families with a wife in the paid labor force was nearly double that of families where the wife did not go out to work, and among Hispanics, it was nearly 75% higher. Appendix, "Median Annual Income of Families by Family Type, Race and Hispanic Origin, 1987," in The American Woman 1990-91, A Status Report 362 (S. Rix, ed. 1990).

13/ Work in America: Implications for Families: Hearing Before the House Select Comm. on Children, Youth, And Families, 99th Cong., 2d Sess. 4 (1986)(Opening Statement of George Miller) (hereinafter "Work in America").

A significant number of women are primary or sole wage earners. Approximately 45% of women in the labor force are single, separated, divorced or widowed.14/ Many of these women have families and many are poor.15/ Another 15% of women in the labor force are married to men earning less than $15,000 a year.16/

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14/ Women's Bureau, Office of the Secretary, U.S. Dept. of Labor, Fact Sheet No. 88-2, Facts on Women Workers, ¶9 (1988)(hereinafter "Facts on Women Workers").

15/ Nearly half of all female headed households (including both working and non-working mothers) were in poverty in 1987, and most of these were households with children. U.S. Children and Their Families: Current Conditions and Recent Trends, 1989, H.R. Rep. No. 356, 101st Cong., 1st Sess. 110-11 (1989)(hereinafter "Children and their Families"). Female headed households represent an increasing share of all families in poverty (51.4% in 1986 as compared to 45.7% in 1982). Children and Families in Poverty: The Struggle to Survive: Hearing Before the House Select Comm. on Children, Youth, and Families, 100th Cong., 2d Sess. 11 (1988).

16/ Facts on Women Workers, supra note 14 at ¶19.



In recognition of the fact that women were in the workforce because of "pressing economic need" and required "protection for their financial security and the security of their families",17/ Congress was particularly concerned about practices that restricted women's access to lucrative and desirable employment and froze them in the status of marginal workers. Statistics on the extent of wage disparity due to occupational segregation reflect the pervasiveness of such practices and Congress found them "shocking".18/ The data reveal that the problem is particularly acute for unskilled women who are concentrated in low-paying, female

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17/ Legis. Hist., supra note 7 at 61.

18/ Id.

intensive industries[19/] and minimum wage jobs.[20/]

Access to non-traditional jobs is therefore especially important to unskilled women if they are to escape from poverty and attain economic security for themselves and their families. Title VII and other civil rights measures brought these women

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19/ There is a clear inverse correlation between wages and the proportion of female employees in jobs. Work in America, supra note 13 at 29, Table 4 (Statement of Janet Norwood). In 1981, the expected median wage in occupations filled exclusively by women was less than half that of the median in exclusively male occupations. National Academy of Sciences, National Research Council, Women's Work, Men's Work, Sex Segregation on the Job (B. Reskin, H. Hartmann, eds.) 1, 10 (1986).

20/ Smith, "The Paradox of Women's Poverty: Wage Earning Women and Economic Transformation," Women and Poverty 122, 137 (C. Gelpi, et al., eds., 1986). Minimum wage now equals only about three-quarters of federal poverty guidelines for a family of three. Children's Defense Fund, "The Unmaking of Decent Family Income" in A Vision for America's Future 18 (1989) (hereinafter "Vision for America's Future").



the promise of such employment,[21/] but policies like Johnson Controls' would close the workplace doors once again. Indeed, sex-based policies take their most extreme and oppressive form in occupations characterized by high wages, good benefits, and entrenched gender-based segregation.[22/] Johnson Controls' policy, effectively excluding women from all employment in its battery plants, is typical of restrictions in male dominated industries.[23/] Thus,

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21/ See, e.g., Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L.Rev. 1219, 1239 (1986).

22/ Id. See note 3, supra.

23/ For example, the policy adopted by the Olin Corporation in 1978 excluded fertile women from five of eleven lines of progression in one division and some jobs elsewhere. Wright v. Olin, 697 F.2d 1172, 1182 (4th Cir. 1982). General Motors' "fetal protection" policy "virtually forecloses the employment of women altogether" at its battery plants. Scott, "Keeping Women in Their Place," in Double Exposure 180, 181 (Chavkin, ed. 1984). And see Grant v. General Motors, appeal

(continued...)

women are now subject to exclusion from the very jobs and occupations that Congress specifically identified as critical to their economic well being and that of their families.

Gender-based policies are less extreme and less common in other occupations, but occur there too, with the effect of denying women employment security and continuity of wages.[24] These examples reveal that if a

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[23] (...continued)
filed (6th Cir. No. 89-3478). Rules barring fertile women from various jobs have reportedly been adopted by Monsanto, B.F. Goodrich, Union Carbide, American Cyanamid, St. Joe's Minerals Bunker Hill Smelter, Gulf Oil and others. Becker, supra note 21 at 1226-27; House Committee Report, supra note 3 at 6.

[24] For example, both Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984) and Zuniga v. Kleberg County Hospital, 692 F.2d 986 (5th Cir. 1982) involved x-ray technicians who were fired when they became pregnant even though both were well within universally accepted safety limits for pregnant women. AT&T has barred pregnant women from jobs at computer chip processing plants because of unconfirmed reports of reproductive

(continued...)



woman's employment can be limited because she could become pregnant and her employer perceives some risk, the reach of such

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[24] (...continued)
health hazards. Bureau of National Affairs. Pregnancy and Employment: The Complete Handbook on Discrimination, Maternity Leave and Health and Safety 66 (1987).

policies is virtually unlimited.25/ Judge Easterbrook commented:

> A female bus or taxi driver is exposed to noxious fumes and the risks of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can refuse to hire women? That an employer could forbid pregnant employees to drive cars because of the risks accidents pose to fetuses? For all we can tell, Johnson's argument compels us to answer "yes" to these questions.

Pet. App. at 92a.

Congressional disapproval of all these results - denial of employment, mandatory pregnancy leave, or other limitations - could not be clearer:

> In some of these cases, the employer refused to consider women for particular types of jobs on the grounds that they might become pregnant. . . . A common practice has been to place women on mandatory unpaid leave, regardless of their ability or inability to work. In some cases, women discriminated against are permitted to return to their former employment after delivery; but in other cases mandatory leave results in loss of previous position, lower pay and loss of employment security. In the extreme case, women who have become pregnant are simply terminated by their employers.26/

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25/ Employers do, in fact, exclude women from work based on their own assessment of risk and in the face of medical opinion to the contrary.

> [When] my supervisor learned that I was pregnant, she told me I would have to stop working.... [E]ven with my doctor's authorization, I was laid off. . . . These last six months have been hard for us. . . . [W]e cannot make ends meet every month. A-68-69.

* * *

> [W]hen the personnel director learned that I was pregnant, I was told that I couldn't stay on the job. I wasn't given any reason, and even my doctor said that I could continue working. The personnel director informed me that if I had wanted to keep my job then I shouldn't have gotten pregnant. . . I was told that the only way I could get my job back would be to lose the baby. I was very upset. No one was able to help. The union was unable to do anything and my doctor refused to sign the papers for disability because he said I could still work. A few days [after this] I miscarried the pregnancy. A-40-41.



26/ Legis. Hist., supra note 7 at 61-62. See A-48, A-68, and A-58.

### B. By Assuring Equal Employment Opportunities, Congress Intended To Improve The Health And Well Being Of Women And Their Families.

Testimony before Congress during the hearings on the PDA documented the link between all types of discriminatory employment practices and the health and well being of women and their families. Congress recognized that when women are denied access to good jobs and adequate benefits, their families -- especially the children [27] -- suffer the consequences.

> The loss of a mother's salary will have a serious effect on the family unit, making it difficult for parents to provide their children with proper nutrition and health care. For some women and their families, it will mean dissipating family savings and security, or being forced to go on welfare.[28]

Income is inversely related to nutritional deficiency in children,[29] and both are linked with a host of negative health effects including delayed growth, weakened resistance to infection and increased vulnerability to environmental

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[27] The risk, of course, extends to adults as well. Unemployed workers who are unable to provide for their families face heightened risk of disease poverty, and malnutrition. Physician Task Force on Hunger in America, "Malnutrition, Ill-Health, and Hunger" in Hunger in America (1985) at 128-29 (hereinafter "Hunger in America") See, Estimating the Effects of Economic Change on National Health and Social Well-Being, S. Doc. No. 198, 98th Cong. 2d Sess. (1984).



[28] Legis. Hist., supra note 7 at 3 (statement of Senator Williams). This is no hyperbole:

> When I began earning more money [at the factory] I took out a personal loan to help me get ahead on some of my other bills. I was not rehired [after a layoff and because of pregnancy]. The factory also discontinued my insurance coverage. . . . Since March of 1989, I have had no income, no insurance and am currently receiving AFDC. A-60.

[29] Hunger in America, supra note 27 at 115.

toxins.[30] Ironically, children from poor families are at particular risk of lead exposure, and black children face the greatest risk.[31]

In general, there is a higher frequency of health problems among poor children. Poor children receive less medical care than wealthier children; they are more likely to suffer from medical illnesses and more likely to experience

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30/ Id. at 99, 116, 118-122; Ebuonu and Starfield, Child Health and Social Status, 69 Pediatrics 550 (1982).

31/ In 1980, the proportion of children with blood leads in excess of 30 ug/dl in families with annual incomes less than $6,000 was nearly ten times greater than the proportion in families with incomes in excess of $15,000. For children in families with incomes from $6,000 to $15,000, the proportion was nearly four to one. Lead from paint in deteriorating housing and high air lead levels in inner cities are the primary sources of childhood exposure. Controlling for all other variables, it was found that black children have higher blood lead levels than white children. Mahaffey, et al., National Estimates of Blood Lead Levels: United States, 1976-1980, 307 New Eng. J. of Med. 573, 577 (1982).



adverse consequences from illness.[32] The developmental hazards associated with poverty and malnutrition may be exacerbated by school absences or other health-related curtailments of normal childhood activities.[33]

Full access to employment opportunities is also significant to the health of women and their families because critical benefits such as medical insurance are most commonly available in larger firms [34] and in unionized, male dominated

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32/ Starfield, Family Income, Ill Health, and Medical Care of U.S. Children, 3 J. of Public Health Policy 245, 247 (1982). At every age level and for every cause of death, poor children die at a higher rate than non-poor. Department of Human Services, State of Maine, Children's Deaths in Maine, 1976-1980 (Final Report) (1983).

33/ Hunger In America, supra note 27 at 101.

34/ See, Pepper Commission Documentation of Findings, Prepared for Bipartisan Commission on Comprehensive Health Care 7 (Nov. 13, 1989, unpublished).

occupations.[35] It is not surprising, therefore, that among women of childbearing age, those most likely to be uninsured are either unemployed or working in low wage jobs.[36]

Lack of adequate insurance has specific negative health consequences.[37] The uninsured are more likely to delay seeking medical care.[38] Many uninsured children are treated only in response to an immediate crisis and seldom receive

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35/ Kamerman and Kahn, "Employers' Response to Their Employees" in The Responsive Workplace: Employers and a Changing Labor Force 60-61 (1987).

36/ Adolescent Pregnancy Prevention: Prenatal Care Campaign, Children's Defense Fund, The Health of America's Children: Maternal and Child Health Data Book 48 (1989) (hereinafter "Health of America's Children"). Black women are more likely to be uninsured than their white counterparts. Id.

37/ See Supporting A Family, supra note 12 at 54.

38/ Gold, et al., Health Insurance Loss Among the Unemployed: Extent of the Problem and Policy Options, 8 J. of Public Health Policy 44, 54 (1987).



essential preventative pediatric services.[39] This is also true in insured, but low income families, since many policies require significant employee contributions,[40] have high deductibles and/or exclude the cost of preventative care.[41]

Pregnant women's income and insurance benefits bear directly on the likelihood of good pregnancy and birth outcomes. Congress specifically acknowledged the

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39/ Supporting A Family, supra note 12 at 57.

40/ Family income is correlated not only with presence of insurance coverage, but also with the extent of employer contribution. Only 27.3% of the children in poor but working households were covered by a plan fully subsidized by the employer in 1986. Health of America's Children, supra note 6 at 45.

41/ See, A Vision For America's Children, supra note 20 at 9. The uninsured and inadequately insured can, and do incur substantial out-of-pocket health care expenses, sometimes exceeding 20% of family income. Supporting A Family, supra note 12 at 56.

"concrete connection between loss of income during pregnancy and a deterioration of the health of the pregnant woman and her child which results from impaired access to a healthful life situation."[42/] Lack of prenatal care and inadequate maternal nutrition, both of which are correlated with poverty,[43/] are also strongly associated with low birth weight and prematurity, the causes of most infant morbidity and mortality in the United States.[44/]

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42/ Legis. Hist., supra note 7 at 65.

43/ It has been demonstrated repeatedly that financial constraints are the most significant obstacle to attaining adequate prenatal care, Health of America's Children, supra note 6 at 52, and poverty is, of course, linked with nutritional deficiencies.

44/ See, Binsacca, et al., Factors Associated with Low Birth Weight in an Inner City Population: The Role of Financial Problems, 77 Am. J. Pub. Health 505 (1987). See also, Children and Families, supra note 15 at 39. It has been found, (continued...)



The cost effectiveness of prenatal health care has been well documented,[45/] and this fact was repeatedly emphasized in testimony presented to Congress by the American Nurses Association in support of

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44/ (...continued)
for example, that babies born to mothers who received no care were:
(1) over six times more likely to be born prematurely;
(2) over three times more likely to be low birthweight;
(3) four times as likely to measure low Apgar scores at birth; and
(4) two-and-a-half times more likely to require intensive care. See Moore, et al., "The Perinatal and Economic impact of Prenatal care in a low socioeconomic population" (1985) (unpublished manuscript).
Some of these outcomes have been specifically linked to inadequate maternal nutrition. See, e.g. Hunger in America, supra note at 117.

45/ See, e.g. Children and Families supra note 15 at 39 ("early, comprehensive prenatal care. . . saves over $3 for each $1 invested.") Regular pediatric care is also cost effective. See, A Vision For America's Future, supra note 20 at 12 (Children receiving such care have annual health care costs 10% lower than children not receiving such care).

the PDA.[46] The evidence was a critical element in Congress' assessment of the overall costs associated with employment discrimination against women. Responding to employers' arguments that the PDA would increase the costs of employing women, Senator Williams, one of the sponsors of the legislation, stated:

> We must also consider the cost which is imposed on society when working women and their families are denied adequate income for a decent standard of living. This cost is felt in terms of medical complications for both the women and their children ....[47]

Congress perceived that the threat to women, their children and other dependents was substantial, and that the price tag of

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[46] Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 466 (1977) (Statement of American Nurses' Association).

[47] Legis. Hist., supra note 7 at 65-66.



discrimination was high. It concluded that full access to employment was the necessary and appropriate response. Johnson Controls would have the Court reevaluate the Congressional equation and find it invalid. But striking this balance is a matter of social policy, therefore a job for Congress, not the courts. Moreover, the conclusion reached by Congress twenty-five years ago, and reaffirmed twelve years ago, remains valid.

### C. Congress Sought To Eliminate Stereotypes That Limited Women's Employment Opportunities.

Johnson Controls' policy assumes that all women who are capable of becoming pregnant will do so, indeed that they might be pregnant at any moment. The policy applies to all women, regardless of their circumstances, their desire to become pregnant, or the likelihood of

pregnancy.[48/] Even though most women do become pregnant at some time in their lives, it is the grossest form of stereotyping to assume that every woman who is capable of conceiving is always about to do so. Once again, the policy at issue in this case threatens a principal purpose of Title VII: to eliminate decision-making based on group characteristics, especially when the result is to deny job

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48/ As noted above, the company's policy, is similar to many others in its total disregard for the individual factors relating to the likelihood of pregnancy.

> At this time [when the policy excluding fertile women was introduced] I was married and had no plans to have any children. I thought that I would be exempt from the policy because my husband had a vasectomy. However, the plant manager told me that even though my husband had been sterilized, I could still "screw around". A-37-38.

See also A-51-52.



opportunities to individuals capable of working. The Court has cautioned that:

> Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Los Angeles Dep't. of Water and Power v. Manhart, 435 U.S. 702, 708 (1978).

Here, in fact, the generalization is not only impermissible, it is also not true. The probability of bearing a child depends on a number of factors including marital status,[49/] sexual orientation, family situation, age, number of existing

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49/ Johnson Controls' policy applies to women of all ages. Pet. App. at 72a-73a. (Posner, J. dissenting). However, the birth rate is near zero at age 40, with only a 0.39 percent probability that a woman between the ages of 40 and 44 will give birth and a 0.02 percent probability that a woman age 45 to 49 will give birth in a given year. U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States (1987) at 59 (1984 rates).

children, birth control method[50] and attitude toward abortion. Women's role in the workforce are also significant to their reproductive choices. The fertility rate in the United States in the last decades has declined steadily,[51] a trend that is both a cause and an effect of women's increased participation in the labor force.[52]

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50/ The risk of unintended pregnancy among fertile, sexually active women is only 6.5%. Public Health Service, U.S. Department of Health and Human Services, No. 182, Advance Data, Contraceptive Use in the United States, 1973-88 (March 20, 1990). Only slightly more than half of unintended pregnancies (53%) will result in a live birth. R. Gold, Abortion and Women's Health, A Turning Point For America (1990) at 11.

51/ See Children and Their Families, supra n.15 at 9.

52/ P. Roos, Gender and Work: A Comparative Analysis of Industrial Societies, (1985) at 15, 121-22. In the last ten years, women have accounted for more than three-fifths (62%) of the increase in the civilian labor force. Facts on Women Workers, supra note 14 at ¶1.



During the duration of the company's voluntary program (1979-1983), in which women were allegedly counselled about workplace risks associated with pregnancy,[53] there were only 8 pregnancies

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53/ The explanation and release signed by each female employee read as follows:

> Lead's effect on the adult person is well understood and we keep people safe and healthy. . . But when it comes to the effect of lead on an unborn child, we know a lot less. . . .but we do know enough to be able to tell you that there are some risks. . .of [a spontaneous] abortion. . .[T]he evidence [of any such risk] is not as clear, for example, as the relationship between cigarette smoking and cancer . . . there is some evidence that animals fed or exposed to airborne lead run the risk of having congenitally affected offspring. . . .

Affidavit of Jean Beaudoin, Exhibit J (Globe Union Policy Guidelines for Women in Lead Exposure)(emphasis supplied). Women were not guaranteed transfers to comparable jobs during pregnancy.

among approximately 275 female workers.[54] The numbers suggest that the risk of harm to future children of Johnson Controls female employees is very small indeed. Moreover, given the small number of women involved, it is difficult to understand why the company made no effort to treat women on an individualized basis.

Nevertheless, Johnson Controls seeks to bar all women because a few will become pregnant. Its policy is based solely on class characteristics that do not necessarily apply to individuals and are not job-related. This is precisely the type of decision-making that is an anathema to Title VII.

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54/ Id. Exhibit K (Selected Pregnancy Data For Plants Under Voluntary Fetal Protection Program). Affidavit of Eunice Williams dated Nov. 27, 1984, ¶4 (establishing number of women employees).



### D. Congress Intended To Enable Women To Combine Employment And Family Life.

Congress was aware that the PDA would preclude employers from adopting policies that restricted women's employment to protect the fetus, but declined to carve out a special exception based on such concerns.[55] Moreover, the Senate was particularly troubled by the possibility that restrictive employment policies based on pregnancy might force women to have unwanted abortions in order to keep their jobs.[56]

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55/ The Chamber of Commerce opposed the legislation, in part because the PDA would prohibit employment decisions based on concerns for the health of a pregnant woman or her child. The issue was raised in the hearings in a question to Andre Hellegers, M.D. who testified that men and fetuses all require equivalent protection. See APHA Brief.

56/ See, e.g., Legis. Hist., supra note 7 at 116 ("One of our basic purposes in introducing this bill is to prevent the tragedy of an unwanted

(continued...)

As a result of these concerns, Congress repeatedly emphasized that Title VII was intended to enable women to combine work and family life and to permit them to make personal decisions without employment related consequences. The language varies, but the message is clear and consistent. Congress sought to offer women "protection and security without fear of reprisal due to their decision to bear children"[57/] and to "put an end to an unrealistic and unfair system that forces women to chose between family and

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56/ (...continued)
abortion forced on a woman because she cannot afford to leave her job without pay to carry out the full term of her pregnancy"). Congress also addressed the possibility that employers might attempt to impose their own ethical values on employees and retaliate against women who had abortions. See e.g., id. at 117.

57/ 124 Cong. Rec. 21440 (1978) (Remarks of Rep. Chisholm).



career[.]"[58/] Indeed, the "entire thrust" of the PDA was "to guarantee women the basic right to participate fully and equally in the workforce without denying them the fundamental right to full participation in family life." [59/]

The policy at issue in this case, which conditions full employment rights on women's willingness to relinquish their fertility directly contravenes the legislative intent.

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58/ 124 Cong. Rec. 21442 (1978) (Remarks of Rep. Tsongas). This is precisely the problem presented by the type of policy adopted by Johnson Controls.

> . . . Generally I'd say that I felt less a woman because of the operation. I think that though my marriage was in bad shape, my sterilization made things even worse. . . . [It has] even affected my second marriage. Both my second husband and I would have very much liked to have had a child together. In fact I tried to have the operation reversed, but was not successful. A-53.

59/ 123 Cong. Rec. 29658 (1977) (Remarks of Senator Williams).

* * *

In sum, Congress clearly considered the economic, social and personal costs incurred when women are denied good jobs and employment security. It weighed the benefits of full employment against the costs of opening jobs to women and struck the balance in favor of full and equal employment opportunities.

## II. The Plain Language Of Title VII Clearly Reflects Congress' Objectives To Prohibit Policies Like Johnson Controls.'

### A. The Statutory Mandate is Unambiguous and Must Be Enforced.

Congress' decision to provide women full and equal employment rights, including the right to make their own choices about working, was expressed in the clearest of statutory mandates. Title VII prohibits employment discrimination on the basis of sex, including "pregnancy, childbirth or



related medical conditions". Further, it requires that women, including those affected by pregnancy childbirth or related medical conditions be treated the same "for all employment related purposes. . . as others not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k).60/

The PDA restated Congress' original intent to prohibit all forms of sex discrimination. 61/ This Court recognized

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60/ The Act's sole affirmative defense, BFOQ, permits exceptions based only on occupational qualifications, i.e., qualifications associated with job performance, and this is consistent with the clear intent and plain language of the PDA. This Court has not addressed the meaning of the BFOQ defense in a sex discrimination case brought after the adoption of the PDA, but prior interpretations are consistent with the understanding that the defense must be closely linked to performance of important job functions. See Dothard v. Rawlinson, 433 U.S. 321 (1977) and Western Air Lines v. Criswell, 472 U.S. 400 (1982).

61/ Prior to enactment of Title VII, rules barring marriage and motherhood for female

(continued...)

this Congressional purpose recently, in California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987). Despite divergent views on the applicability of the Act in other contexts, eight members of the Court agreed that the PDA prohibits intentional discrimination against women who are or might be pregnant, but who are able to work.

The majority opinion acknowledged the controlling significance of the "ability or inability to work" language of the statute:

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61/ (...continued)
employees were commonplace. E.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam). Pregnant women were placed on mandatory maternity leave, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and were denied accrued seniority and other benefits. Cf. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). Pregnancy was widely excluded from employment-related health insurance and disability plans. Gilbert v. General Electric Co., 429 U.S. 125 (1976), Geduldig v. Aiello, 417 U.S. 484 (1974). The legislative history of the PDA reveals Congressional intent to solve the problem of sex and pregnancy discrimination definitively.



the "second clause was intended to . . . illustrate how discrimination against pregnancy is to be remedied." Cal Fed, 479 U.S. at 285. This reading was necessary to effectuate the Congressional purpose "to provide relief for working women," id. at 286, and to "'protect [them] from the full range of discriminatory practices.'" Id. at 299 n.3 (White, J., dissenting).

Justice White, writing for himself, Justice Powell and Chief Justice Rehnquist, disagreed with the majority's conclusion that the statute permits state mandated preferential treatment of pregnant workers,62/ but had no disagreement regarding its absolute prohibition on the type of discriminatory practice involved

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62/ Unlike Cal Fed, there is no suggestion here that the policy at issue might help "'to achieve equality of employment opportunities and remove barriers.'" Id. at 288, quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

here. Quoting from the Senate Report that "'treatment of pregnant women...must focus ...on the actual effects of their condition on their ability to work'," Justice White noted that the "'ability to work'" language means "'exactly what it says in a situation where it is directly implicated.'" Id.

The opinions of the members of the Court sitting in the Cal Fed case evidence virtually unanimous recognition of the PDA's purpose to eradicate all forms of discrimination against women based on sex or childbearing capacity.[63/] As the Court acknowledged, the commitment to provide women full employment rights was conditioned only on the "ability to work" standard.

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63/ Justices Stevens and Scalia, concurring, addressed other issues not relevant here, but indicated no disagreement with these principles as articulated in the majority opinion.



This result is not surprising. Numerous decisions of this Court have reiterated that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive." Consumers Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980). The duty of the federal courts to enforce the plain language of federal statutes precludes independent judicial assessment of the wisdom of Congress' decision:

> Our individual appraisal of the wisdom or unwisdom of a particular course selected by Congress is to be put aside in the process of interpreting a statute.

TVA v. Hill, 437 U.S. 153, 194-95 (1978).

Even if this Court, like the majority of the Seventh Circuit, were to disagree

with Congress' conclusion that employers may not substitute their evaluation of the risks and benefits of work (including the risks and benefits to current and future children) for the decisions of women themselves, it is bound by the Congressional decision to the contrary, precisely because certain judgments are committed to the legislative process:

> [The Court has] no expert knowledge on the subject, much less do we have a mandate from the people to strike a balance of equities. . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck.

Id. at 194.

### B. The Possibility That Employer Costs Will Increase As A Result of Women's Employment Does Not Affect the Statutory Mandate Against Discrimination.

Departures from the statutory mandate are not permitted even if additional costs may result from compliance:



> Even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country.64/

As a result, the Court has invalidated the use of accurate, sex-based actuarial tables in setting pension and life insurance rates, notwithstanding the fact that use of non-discriminatory tables would arguably increase employer costs. Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702. See also Arizona Governing Committee v. Norris, 463 U.S. 1073, 1084-65 n.14 (1983) ("the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based plan.") Thus, even if women did require additional protections from occupational exposures,

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64/ Legis. Hist, supra note 7 at 48.

Title VII would require that employers bear the costs of making the workplace safe.65/

Johnson Controls did not assert a cost-based defense to this Title VII action, presumably in recognition of the Court's unambiguous holdings on the issue. Nevertheless, the issue is addressed in the opinions in the court below.

The costs of providing equal employment opportunities in the face of

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65/ Congress has sought to minimize the risks of employment for both working women and men through the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., which requires that health protection be afforded at the "most protective" level, subject to constraints imposed by technological and economic feasibility. American Textile Manufacturers Institute v. Donovan, 452 U.S. 490 (1981). It is entirely appropriate that the cost issue be addressed by a regulatory agency and on an industry-wide basis. See APHA Brief. A Title VII defense based on firm-specific "clean-up costs" would reward the least efficient employers by allowing them to discriminate while putting more viable concerns at a competitive disadvantage. Such a defense could also result in irrational and inconsistent application of the statute, even within a single jurisdiction.



recognized reproductive hazards might include not only the cost of making the workplace safe, but also the cost of potential tort liability to children of workers exposed to lead.66/ Judge Posner, in dissent, was particularly concerned with the second issue and suggested that such liability might at some point "become large enough to affect the company's normal mode of operation and supply the ground for a

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66/ In addition, both Judge Posner and the majority expressed some concern about the costs to society for caring for children who might be harmed by women's occupational exposure. Indeed, despite the lack of any documentation, the majority relied on these potential costs to support its conclusion that the policy was justified. Pet. App. at 51a. This approach is legally insupportable and totally inconsistent with Congress' conclusion that the social cost of denying women equal employment outweighed countervailing concerns. The majority balanced the interests of "the employer, the employee, and the unborn child," Pet. App. at 42a, as if this were not a legislative function, and more importantly, as if the balance had not already been struck by Congress on the basis of careful consideration and extensive evidence. See Point I, supra.

bona fide occupational qualification." Pet. App at 68a. As noted above, this approach lacks statutory or precedential authority and indeed simply ignores the PDA's command that women who are able to work must be permitted to do so.

There are, however, additional reasons to reject the suggestion that the potential for tort liability should constitute a defense in Title VII cases:

> In today's litigious society, the potential for litigation rests in almost every human activity....The employer is, of course, free to protect itself from financially ruinous lawsuits by purchasing insurance and maintaining the degree of care required by law.

Hayes v. Shelby Mem. Hosp., 726 F.2d at 1553 n.15. For a responsible employer, the risk of liability to children of female workers is remote, as discussed below. In any event, there is also a risk of liability to children of male workers, as



well as to consumers and others.[67] Johnson Controls and other employers with similar policies undertake these risks as a part of doing business. They have presented no reason to suggest that any liability-related concerns associated with women's employment cannot be handled in precisely the same manner.

Finally, permitting a defense based on potential liability would undermine the

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67/ Becker, supra note 21 at 1236-37, 1245. (noting instances in which the children of male workers assert paternally-mediated genetic injury).

Johnson Controls can cite no suits brought by children of women workers exposed to lead. On the other hand, there has been a tort suit brought by male workers, their wives and children alleging intentional injury or gross negligence. Wade v. Johnson Controls, 693 F.2d 19 (2d Cir. 1982). There has also been at least one significant judgment against the company on the basis of defective products. Jones, et al. v. Sears and Roebuck, Inc., Globe Union, Inc., et. al., No. 585-427 (Cal. Super. Ct., San Diego County, May 17, 1987), appeal filed No. D009904 (Cal. Ct. App., 4th App. Dist., Div. 1, riled Apr. 10, 1990)($9.7 million jury verdict for plaintiffs injured by exploding battery).

deterrence and safety-enhancing goals of tort law. An employer who complies with OSHA standards, implements available technology to reduce exposures and adequately warns employees of remaining but unavoidable risks is not likely to be held liable to subsequently born children on either a negligence or strict liability theory.[68/] A cost-based defense would

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68/ See generally, 1 S. Pegalis and H. Wachsman, American Law of Medical Malpractice at 98-103 (1980) and 2 M. Dixon and F. Woodside, Drug Product Liability §11.02[1] (1989); Hughson v. St. Francis Hospital, 459 N.Y.S.2d 814 (N.Y. App. 1984) (pregnant woman's consent to medical procedures is binding on subsequently born child); Needham v. White Laboratories, 847 F.2d 355 (7th Cir. 1988), (adequate warning provided to pregnant women sufficient to preclude "failure to warn" claim by later born child). In the medical malpractice context, the informed consent decisions are premised on respect for personal autonomy and the notion that competent adults should be permitted to make reasoned risk assessments for themselves and minor children (and fetuses). This approach is, of course, consistent with that taken by Congress in Title VII, see, Point I, supra, and effectively disposes of Judge Posner's concern about the problem of irreducible risks. See Pet. App. at 66a and 69a.



therefore eliminate any incentive created by the tort system to make the workplace safe, while giving employers wholesale license to exclude any class of workers they deem, for whatever reason, particularly vulnerable.

### C. The Court Below And Other Courts Of Appeals Have Failed To Implement Title VII As Congress Intended.

In its decision to permit a "business necessity" defense, the court below purported to follow two decisions rendered by other circuits.[69/] Both of those cases, however, represent significant departures from the statutory scheme, as it has been consistently interpreted by this Court.

In Wright v. Olin Corp., the court acknowledged that a sex-based policy of exclusion could not satisfy the BFOQ

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69/ Wright v. Olin Corp. 697 F.2d 1172 and Hayes v. Shelby Mem. Hosp., 726 F.2d 1543.

standard, 697 F.2d at 1185-86, n.21, and then rejected that analysis specifically to permit a defense, predictably distorting Title VII in the process. While it is true, as that court notes, that a Title VII plaintiff may advance different theories, it is not correspondingly true that a defendant may proffer any defense regardless of the nature of the prima facie case. Rather, the defense, to be availing, must specifically match the gravamen of the claim.

Claims and defenses in Title VII cases can be generally grouped in three separate tiers. At one level is the individual disparate treatment case, in which intentional discrimination is inferred from differential treatment. Articulation of a non-discriminatory reason provides a defense to the prima facie case, which can



then be rebutted by proof that the proffered explanation is a pretext for discrimination.[70] Intent is irrelevant in disparate impact cases, which focus on the effects of discrimination, as shown by a statistically significant effect of a neutral policy on a protected group. The employer must show that "the challenged practice serves, in a significant way, the legitimate employment goals of the employer."[71] Finally, overt facial discrimination can only be justified by the most rigorous standard, BFOQ, and is

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70/ E.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). The inapplicability of this analysis to cases involving overt discrimination is conceded in Wright and Hayes. Cf. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

71/ Wards Cove Packing Co. v. Atonio, 490 U.S. ___, 109 S.Ct. 2115 (1989) ("business necessity" defense).

otherwise flatly prohibited. See p. 45 n. 60, supra.

A sex or pregnancy-based policy cannot be deemed "neutral." Title VII has been amended specifically to preclude that construction. See Point IIA, supra. Nevertheless, the Wright court applied the lower level business necessity defense, which was crafted for cases not involving intentional or overt discrimination. Congress clearly stated that where overt or intentional discrimination is involved, the challenged practice can be justified only as a BFOQ. The approach adopted by the Fourth Circuit is thus unauthorized, illogical and, as a matter of law, must be rejected.72/

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72/ See also Becker, supra note 21 at 1251, 1260-63. This distinction between overt discrimination and discrimination resulting from neutral practices is not mere "semantic quibbling," (continued...)



The Hayes court embraced a different, but related, error in its desire to permit a defense. Ignoring the male and female employee/parents who are the intended beneficiaries of Title VII, that court decided that a policy that protected their offspring "neutrally," i.e.. provided the same level of protection, was a "neutral policy," justifiable by business necessity. But, once again, Title VII unequivocally rejects any contention that an overt pregnancy or sex-based policy can be

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72/ (...continued)
Wright, 697 F.2d at 1186, but has substantial significance. Under Title VII, the employer has always borne the burden of proof to justify a demonstrably discriminatory policy. E.g., Dothard v. Rawlinson, 433 U.S. 321. That rule has been altered in cases involving disparate impact, but not in those involving intentional discrimination. Compare Wards Cove Packing Co. v. Atonio, 490 U.S. ___, 109 S.Ct. 2115 with Price-Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775 (mixed motive).

"neutral,"[73] regardless of its effect on offspring. By definition, it is not neutral with respect to workers, who may nor may not become parents, and it is their rights Title VII protects.

The Supreme Court has unequivocally rejected the notion that sex-based classifications can somehow be justified because of arguably "neutral" effects:

> . . . the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department.

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73/ It was precisely this fiction the PDA was intended to eliminate. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669. (1983).



Manhart, 435 U.S. at 716. This Court has also held that it is no defense to intermediate acts of discrimination that the final result of an employment process, or "bottom line," is non-discriminatory. Connecticut v. Teal, 457 U.S. 440 (1982). Thus, even if the "bottom line" - the effect on offspring - were the same for women and men, it remains true that women are subjected to discriminatory treatment because Johnson Controls' policy and others like it impose on them terms and conditions of employment which are not applied to men.

In sum, the disparate treatment "business necessity" analysis applied in Wright, Hayes and the court below is inappropriate here. Johnson Controls' policy can be justified only as a BFOQ. However, because women can perform the jobs at issue, this defense is unavailing as a

matter of law. A contrary result would conflict with the plain language of Title VII and the central goals underlying the legislation.



## CONCLUSION

Wherefore, amici urge the Court to reverse the decision of the Seventh Circuit and remand with instructions to enter judgment for petitioners.

Respectfully submitted

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## APPENDIX

### Statements of Interest of Organizational *Amici Curiae*

The **AMERICAN CIVIL LIBERTIES UNION (ACLU)** is a nationwide, non-partisan organization of over 250,000 members. The Women's Rights Project of the ACLU Foundation was established to work toward the elimination of the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sex discrimination in employment and discrimination against women of childbearing capacity. The **American Civil Liberties Union of Wisconsin** is the Wisconsin state affiliate of the ACLU.

The **AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION (ACTWU)** is an international trade union, with 260,000 members in the apparel, textile and related industries. It has many members -- both women and men -

- exposed to lead and other reproductive chemical hazards in a wide variety of industries. Many of these workers will be directly affected by the principles established in this case.

The **AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW)**, a national organization of over 140,000 college-educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. For more than a century AAUW has worked toward those goals by responsible participation in public policy issues at local, state, national and international levels. AAUW supports constitutional protection for the rights of all individuals and opposes all forms of discrimination. Therefore, AAUW has a strong interest in the outcome of this case.



The **AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, (AFSCME)**, which represents approximately one million public employees, is the nation's largest public employee labor union. AFSCME represents many men and women in the health care and sanitation industries whose jobs continuously expose them to hazardous toxic substances and chemicals.

The **AMERICAN FRIENDS SERVICE COMMITTEE** has since 1917 been active in works of humanitarian relief and service, reconciliation among nations and peoples, and programs to overcome discrimination and oppression. The AFSC carries out its work as a service agency of the Society of Friends in America. The AFSC has a vital interest in this litigation because of our belief in the infinite worth of each human

being and the equality of all human beings in the sight of God. This belief has led the AFSC to commit a significant portion of its resources to work which seeks to root out the causes of violence in society which lie in poverty and imbalance of wealth, in exclusion, and denial of rights.

AFSC works in this country and in other parts of the world in support of the efforts of women to have access to jobs that provide adequate income in workplaces that are free of hazards. We have worked for the past decade, in parts of Appalachia in support of women challenging exclusion from jobs in coal mining and road construction, the only well-paid jobs available to people without college degrees.

In addition AFSC has worked along the Mexico-U.S. border for more than twenty



years in programs dealing with health, human rights and economic development. In the 1970s we became concerned about the impact of maquiladoras, the foreign-owned assembly plants located in Mexico along the border between the two countries. We have seen vividly the impact on the health and safety of the young women who work at extremely low wages - $4 a day or less - in plants which give little attention to health and safety considerations. One of these plants is owned by Johnson Controls in Reynosa, Mexico, making automation controls, including day long work with lead solder. Our staff report that the company does not provide warnings in Spanish of the danger of lead exposure to fetuses, does not test workers' blood and actively recruits young women workers.

Thus for us, the present case deals with issues of exclusion and of safety in which we have a longstanding and profound interest.

The **ASIAN IMMIGRANT WOMEN ADVOCATES (AIWA)** educates and organizes Asian immigrant women employed as seamstresses, hotel maids, waitresses, nursing aides, and electronic assemblers. Many of these immigrant women suffer from extremely poor working conditions and occupational hazards. For instance, the electronics industry has a high rate of occupation related illnesses compared to other businesses. Environmental pollution is also a problem in neighborhoods near electronic plants, where toxics have been discovered in the water and residents have reported a higher incidence of birth defects and miscarriages. Seamstresses



develop respiratory diseases, eye strain, and muscle pains from inhaling dust, threads and fabric dyes. Therefore, AIWA has a strong interest in the outcome of this case affecting the working conditions and rights of working women.

The **BOSTON WOMEN'S HEALTH BOOK COLLECTIVE** is a non-profit organization devoted to education about women and health. Its many projects and services include a women's Health Information Center, which is open to the public, and the extensive distribution of materials to the public about women and health. In addition, the Collective has authored a major publication concerning women and health, Our Bodies, Our Selves, which has been translated into thirteen foreign languages

The **CENTER FOR CONSTITUTIONAL RIGHTS** (CCR) was born of the civil rights movement and the struggle of Black people in the United States for true equality. CCR attorneys have been active in cases involving employment discrimination, voting rights, jury composition, and fair housing. Through litigation and public education, CCR has worked to protect and make meaningful the constitutional rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos. CCR attorneys served as counsel of record for the amici supporting the right of unwed mothers to employment in the public school system in Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976).



The **CENTRAL NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH** is a not-for-profit organization dedicated to workers' health and safety rights. Its members include 40 area union locals, individual organized and unorganized workers, concerned health providers, attorneys, educators, and others. It believes the Seventh Circuit Court of Appeals' decision in this case undermines the OSHA lead standard and the health of all workers. Furthermore, the decision simultaneously restricts women's employment opportunities and leaves men exposed to hazardous work conditions.

The **COAL EMPLOYMENT PROJECT** is a national membership organization of women coal miners and their supporters. Since its founding in 1977, CEP has supported women miners in efforts to open up mining

jobs for women, eliminate discrimination and harassment, and improve health and safety conditions for all miners. The outcome of this case is of vital importance to our membership.

The **COALITION OF LABOR UNION WOMEN** is America's only national organization for union women, with 75 chapters across the county and over 20,000 members representing 60 unions. CLUW is dedicated to ending job discrimination against women and minorities, defending the right of each woman to make reproductive decisions in private, and achieving safe and healthy working conditions for all workers.

The **COMMITTEE FOR RESPONSIBLE GENETICS** is a group of approximately 600 scientists and others concerned with social and ethical implications of biotechnology, including reproductive technology, which



promotes the broadest possible public participation in development of relevant decisions. The Committee for Responsible Genetics opposes exclusionary employment practices because they violate workers' civil rights and fail to ensure the reproductive health of all employees in the workplace.

The **COMMUNICATIONS WORKERS OF AMERICA (CWA)** is an international trade union, representing 650,000 workers in information industries. It has many members -- both men and women -- who are exposed to toxic chemicals in their work and therefore are directly affected by the principles established in this case.

The **CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.** was incorporated in 1973 as a non-profit public interest law firm advocating for women's legal rights. We

have over 500 members and serve thousands of people in New England each year through our litigation, community education, research and information and referral programs. We choose to join this case as an amicus curiae because we have worked with thousands of women workers who have suffered serious economic and personal losses as a result of workplace discrimination.

The **EMPLOYMENT LAW CENTER**, a project of the Legal Aid Society of San Francisco, is a private non-profit public interest law firm which specializes in employment discrimination. Founded in 1916 to represent individuals unable to afford legal counsel, the Center is dedicated to the eradication of all forms of employment discrimination including sex discrimination.



The Employment Law Center is counsel for Queen E. Foster in Johnson Controls, Inc. v. California (Fair Employment and Housing Commission and Queen Elizabeth Foster), which was recently decided in the California Court of Appeal and was denied review by the California Supreme Court. Ms. Foster applied for a position with Johnson Controls at their Fullerton, California plant and was denied employment because she refused to provide medical evidence documenting her inability to conceive children. In an unanimous opinion, the Court of Appeal ruled in Ms. Foster's favor and held that Johnson Controls "fetal protection" policy violated California's prohibition against discrimination on the basis of sex. Prior to representing Ms. Foster, the Employment Law Center participated as an amicus curiae

in Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

In the area of sex discrimination, the Employment Law Center has also filed amicus curiae briefs in the United States Supreme Court including California Federal Savings & Loan Association v. Guerra; Hopkins v. Price Waterhouse; Meritor Savings Bank, FSB v. Vinson; Rotary Club of Duarte v. Board of Directors of Rotary International; and Wygant v. Jackson Board of Education.

The **INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO** is a national labor organization headquartered in Akron, Ohio. It has over 300 affiliated local unions in over 500 bargaining units, representing about 40,000 hourly workers in the U.S. chemical industry. Many of its members are occupationally exposed to lead, as well as other chemicals. The Union is concerned



that a company may discriminate in work assignments rather than reducing exposure levels to make the workplace safe for workers of both sexes. This is a particularly critical concern with exposure to material such as lead, which has demonstrable reproductive effects for men as well as women.

The **MAINE LABOR GROUP ON HEALTH** is a statewide, non-profit organization dedicated to protecting the health and safety of Maine working people and their families. It provides worker educational programs and serves as workers' advocates within the health care system and in the public policy arena.

The **MASSACHUSETTS CHAPTER OF THE NATIONAL LAWYERS GUILD**, was founded in 1937, in part to counter the exclusionary policies of the American Bar Association

which at the time did not admit Black attorneys to membership, the NATIONAL LAWYERS GUILD and its MASSACHUSETTS CHAPTER have a long history of opposing exclusionary employment policies. The MASSACHUSETTS CHAPTER, with over 325 members, has a working committee on reproductive rights which is involved in legal and educational efforts to protect reproductive rights, including the rights of all workers to be free from reproductive hazards in the workplace. The organization is opposed to "fetal protection" policies unilaterally adopted by employers which exclude women of child-bearing capacity from jobs and employment benefits and fail to protect the health and safety of all workers - male and female.

The **MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH (MassCOSH)** is a coalition of 85 labor organizations, representing over 150,000 workers and 150 occupational health professionals in Massachusetts. MassCOSH is dedicated to improving health and safety conditions in the workplace through technical assistance, training, and education and political action. MassCOSH, which has a reproductive hazards project and regularly conducts workshops with member locals regarding reproductive hazards in the workplace, believes that all workers are entitled to a safe workplace.

The **MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF)**, established in 1967, is a national civil rights organization headquartered in Los Angeles. Its principal objective is to assure, through litigation and education, the civil rights of Hispanics living in the United

States. Given the increased representation of Latinas in our nation's workforce, many of MALDEF's efforts are directed at eliminating discriminatory barriers to equal employment opportunities.

The **NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL)** has over 400,000 members in 41 state affiliates and the national organization. NARAL is dedicated to guaranteeing women the full range of reproductive choices, including the right to bear children without economic sanctions, which is critical to women's autonomy and equality.

**9 TO 5, NATIONAL ASSOCIATION OF WORKING WOMEN**, is a nationwide membership group dedicated to improving the status and working conditions of office workers. For more than seventeen years, 9 to 5 has been concerned with bringing attention to the



health and safety hazards faced by working women. We strongly believe that employers should meet their legal obligations to provide safe workplaces to all workers, and are opposed to the exclusion of women as a substitute for correcting job hazards.

The **NATIONAL BLACK WOMEN'S HEALTH PROJECT** is a health, education and advocacy organization which works to improve the quality of life for African-American women. It works to promote non-discriminatory approaches to insure that all African-American women have access to health services, including abortion, that maximize maternal health, reduce infant mortality and produce healthy babies. Because poor African-American women are particularly vulnerable to economic coercion, the impact of exclusionary policies may be particularly severe for them.

The **NATIONAL COUNCIL OF JEWISH WOMEN**, founded in 1893, the National Council of Jewish Women (NCJW) is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's National Resolutions that include working for "employment policies which safeguard the dignity, rights, benefits, health and safety of all workers," it joins this brief.

The **NATIONAL LAWYERS GUILD** is a national organization representing over 8,000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters



throughout the United States. Since its founding 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The Guild is firmly committed and works actively to protect the rights of all people, and specifically the right of women to equal access to employment.

The **NATIONAL ORGANIZATION FOR WOMEN (NOW)** is a national membership organization of approximately 150,000 women and men in about 700 chapters throughout the country. It is a leading advocate of women's equality in all areas of life. One of its priorities is assuring the right to full employment opportunity without a sacrifice of health or reproductive rights.

The **NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, AFSCME, AFL-CIO (NUHHCE)**, is a labor organization

representing approximately 38,000 professional and non-professional hospital and health care workers. Many of its members - male and female -are regularly exposed to numerous toxic substances and hazardous chemicals in their workplace and would be directly affected by the principles established in this case. Because of its historic and activist opposition to discrimination of all kinds and its concern for the health of all workers and the public, NUHHCE has a strong interest in this case.

The **NATIONAL WOMEN'S HEALTH NETWORK (NWHN)** is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations representing 500,000 women, seeks to give women a voice in the health care system in the United States. NWHN supports women's



right to have complete control over their bodies, particularly the right to decide when, where and how to give birth, and opposes policies which condition employment on the loss of fertility.

The **NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC)** is a nationwide membership organization dedicated to the election and appointment of more women to political office. NWPC also works to ensure equality for women in all aspects of life.

The **NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (NYCOSH)** is a non-profit membership organization dedicated to the right of all workers to safe and healthy working conditions. Its membership includes over 160 union locals and regional councils, as well as individual workers, medical and legal professionals and community activists, all working together

to eliminate workplace hazards. NYCOSH, which has a reproductive hazards committee, believes that exclusionary policies are not the appropriate solution to reproductive hazards in the workplace.

The **NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH PROJECT (NCOSH)** is a private, non-profit membership organization working to improve occupational safety and health conditions for all North Carolinians. Approximately 70 local unions representing 27,000 workers and 400 health and legal professionals concerned about occupational health are NCOSH members. NCOSH believes that exclusionary employment practices and policies are inappropriate and illegal solutions to the problem of dangerous occupational exposures. Exclusionary policies violate the rights of women to



pursue equal employment and the rights of all workers to a safe workplace.

**NORTHWEST WOMEN'S LAW CENTER** is a private, non-profit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, legislation, education, and providing information and referrals. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court and other courts.

The **OCCUPATIONAL SAFETY AND HEALTH LAW CENTER (OSHLC)** is a public interest law firm which represents individuals, families, organizations, and unions in health and safety matters. The OSHLC has an on-going concern with regard to

reproductive rights and the protection of both men and women on the job from any risk to those rights.

The **OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION (OCAW)** has 100,000 members, a substantial number of whom are employed in industries and are potentially affected by exclusionary employment policies similar to the one at issue in this case. The OCAW opposes exclusionary policies which single out members of one sex, and it actively seeks to develop and encourage the use of policies which will protect the health of all workers.

The **PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH (PHILAPOSH)** is a private, non-profit corporation which seeks to promote the health and safety of employees in Eastern Pennsylvania, Southern New Jersey, and the State of Delaware.



PHILAPOSH has approximately 175 affiliated local unions with a combined individual membership of over 200,000. PHILAPOSH has regularly participated in litigation which raises important health and safety issues, either as a party or as amicus curiae. Over the last several years, PHILAPOSH has presented a number of workshops and conferences on reproductive hazards in the workplace and issues of particular concern to women workers. PHILAPOSH has published a pamphlet, "Getting Job Hazards Out of the Bedroom."

The **PLANNED PARENTHOOD FEDERATION OF AMERICA (PPFA)** is a not-for-profit corporation organized in 1922. It is the nation's oldest and largest voluntary family planning agency. Its 180 affiliates in forty-three states and the District of Columbia provide medical, educational and

counseling services to meet the family planning needs of over two million Americans per year. PPFA believes that the ability to regulate one's own fertility is a basic human right and is concerned that female workers not be penalized in their exercise of that right. The organization further believes that this issue can and must be resolved in a manner that protects the health interests of all workers and their children without sacrificing the workers' rights to equal employment opportunity.

The **ROCHESTER COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (ROCOSH)** is a non-profit organization comprised of unions, health and legal professionals, industrial hygienists, educators, and concerned individuals who believe all working people are entitled to a safe and healthy



workplace. Our union affiliates represent about 32,000 persons. ROCOSH is interested in this case because of its belief that working people should not have to choose between making a living or preserving their life and health. Upholding Johnson Controls' "fetal protection policy" would pervert OSHA's mandate that employers provide a safe workplace and would threaten womens' employment opportunities. If allowed to stand, this decision could have implications for several workplaces in the Rochester area.

The **SANTA CLARA CENTER FOR OCCUPATIONAL SAFETY AND HEALTH (SC-COSH)** is a group representing 170 labor unions, workers and occupational health professionals in northern California, dedicated to improving health and safety conditions in the workplace.

The **SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU)** represents 925,000 workers in the U.S. and Canada. Its workers work primarily in the service sector, in a broad spectrum of workplaces including hospitals, offices, and food service facilities where they are exposed to toxic substances that adversely affect reproduction and health generally. The use of exclusionary practices, instead of a comprehensive approach to health protection, could threaten the economic status of a large number of members.

**SILICON VALLEY TOXICS COALITION** based in San Jose, California, includes labor unions, environmental organizations, doctors and other public health workers, fire fighters, clergy, and neighborhood organizations. It advocates that industry and government must protect the public



health and works to prevent exposure of the public to toxic substances.

The **UNITED MINE WORKERS OF AMERICA, [INTERNATIONAL UNION (UMWA)]**, is a 100-year old organization which represents approximately 150,000 miners and retirees in North America. The UMWA is committed to the complete elimination of impediments to job opportunities based on race and gender. The UMWA believes that employers must remove and protect against work-related health hazards. Barring women or others from jobs due to those hazards is an evasion of the employer's responsibility for workplace health and safety. Moreover, such exclusionary policies do not promote safety because men remain exposed to the hazards. Rather, these practices shift the risks and burdens of an unhealthy work

environment to those least able to bear them.

The **WESTERN NEW YORK COUNCIL ON OCCUPATIONAL SAFETY & HEALTH (WNYCOSH)** is an organization comprised of 60 area union locals (representing 55,000 workers) and a number of health professionals in the Western New York area. WNYCOSH is part of a consortium of organizations, including the Cornell-Chemical Hazards Information Program, the SUNY Buffalo Toxicology Research Center, and the Union Occupational Health Center Clinic which cooperate in providing educational and technical assistance services to workers in the region. WNYCOSH is concerned that any judicial decision that undermines the OSHA lead standard is inappropriate since there is evidence that lead constitutes a reproductive hazard for both sexes.



**WIDER OPPORTUNITIES FOR WOMEN** has worked nationally and in Washington, D.C. for twenty-five years to achieve economic independence and equality of opportunity for women and girls. WOW has a solid track record of achieving advances for women in economic policies, employment practices and employment and training programs. As an organization committed to improving the economic and employment status of women, WOW is deeply concerned about the protection of women's rights on the job.

The **WOMEN'S ECONOMIC AGENDA PROJECT (WEAP)** is a California state-wide, multi-racial, cross-class women's rights and empowerment organization. Our work includes the fight for public policies that support low income women, because women and children are the majority of the impoverished population. Today, both women

in the paid workforce and AFDC mothers worry about adequate income for food, rent, health care and decent and affordable child care. WEAP has a long standing policy against laws that block job and training advancement because of pregnancy, as well as other gender and race based discrimination policies.

**WOMEN EMPLOYED**, based in Chicago, Illinois, has a national membership of 3,000. It assists working women with problems of sex discrimination and health and safety issues. Because the policy at issue in this case threatens womens' employment rights, it is of particular concern to Women Employed.

**WOMEN'S LAW PROJECT (WLP)** is a non-profit feminist law firm which seeks to advance the legal and economic status of women through litigation, public education,



and individual counseling. During the past fifteen years of its existence, WLP's activities have included work in the areas of reproductive freedom, pregnancy discrimination, and employment discrimination. WLP is dedicated to eliminating discrimination against women based on childbearing capacity and to securing the right of women workers to equal access to safe workplaces.

**WORKSAFE FOR HEALTHY COMMUNITIES** is a coalition of organizations and individuals representing labor, business, environmentalists, health professionals, community based organizations, and others in California. Worksafe is dedicated to: (1) educating the public about the need for worker protection and the relationship between control of workplace hazards, community health and environmental

protection; and (2) seeking to ensure that California establishes an effective and comprehensive workplace protection program that will serve as a model for the nation. Worksafe opposes exlusionary employment practices because they fail to control toxic use at its source and result in discrimination against workers. Worksafe believes that an effective workplace and environmental hazard control program must seek to reduce and control toxic use, rather than controlling worker fertility.

Statements of Interest of Individual
Amici Curiae

**STATEMENT OF INTEREST OF VICKY BUTTICE**

I worked for five years in a high lead department of a chemical factory. Though the work was hard, the pay (about $13.00/hour) and benefits were very good.

I was told, both at my job interview and during the orientation on my first day



of work, that the research on the dangers of working around lead were still out and that there were no conclusions, either pro or con that could be drawn from the research. I was therefore surprised to learn after I had worked there for a while that management had introduced a policy which prohibited all women who could conceive from working in the high lead areas. At the time I learned about the policy I was also told that if I wanted to continue working around lead I would have to give personnel a letter from my doctor confirming that I could not have children.

At this time I was married and had no plans to have any children. I thought that I would be exempt from the policy because my husband had had a vasectomy. However the plant manager told me that even though

my husband had been sterilized I could still "screw around."

I was informed by a personnel representative that I could definitely keep my job in the high lead area if I would agree to being sterilized. However I would have to have an examination by the company doctor to determine if I could have children and sign a paper stating that I would not sue the company. I refused to sign the paper, and within a few days, I was laid off.

I eventually took a job at a fast-food restaurant at a substantial cut in pay. It took me a long time to find work after my layoff because the economic situation in my community and the surrounding area is very bad. There are no other companies within 20-25 miles of where I live that offer



comparable salaries or benefits to those of the chemical plant.

My layoff made things very difficult for both my husband and myself. When I began work at the chemical plant, we had taken a mortgage to buy our house. In addition to his full time job at the chemical plant, my husband had to take a part-time job in construction and work seven days a week. Even with my husband working so much, we were barely making ends meet. The loss of income from my salary also created a lot of tension between us. During that time we seemed to argue often over money and how we were going to pay our bills.

**STATEMENT OF INTEREST OF CYNTHIA GARZA**

In 1979 I began working for a battery manufacturer because that plant is the best place to work in my town in terms of its

salaries and benefits. I was hired as an order checker in the shipping department, but was transferred several times into jobs that paid more and gave me the chance to earn shift premiums, which helped a lot in paying my bills.

In 1985, I became pregnant a second time. The department where I worked at that time was not a high lead area, but when the personnel director learned that I was pregnant I was told that I couldn't stay on the job. I wasn't given any reason, and even my doctor said that I could continue working. The personnel director informed me that if I had wanted to keep my job then I shouldn't have gotten pregnant. I filed a grievance through the union for discrimination, but in a meeting I and the shop steward had with the personnel director, I was told that the



only way I could get my job back would be to lose the baby.

I was very upset. Nobody was able to help. The union was unable to do anything and my doctor refused to sign the papers for disability because he said that I could still work. A few days after my meeting with the personnel director, I miscarried the pregnancy. I had been approximately thirteen to fourteen weeks pregnant.

**STATEMENT OF INTEREST OF PAT GRANT**

In 1976 I began working in the foundry of an automobile plant. At that time I had one child.

The first time I learned about the policy excluding women of childbearing capacity was late in 1980, after I had already had my second child, when I was told to go to the company's medical department. They told me that I could not

continue to work in the foundry as an iron pourer because this job exposed me to a high level of lead. I was also told that in order to keep my job I would have to be sterilized. There were no exceptions to the policy, even though I told the medical people that I was then using birth control and had no plans for becoming pregnant. I objected to the policy and, along with other women in the plant, filed a grievance with the union against the company for discrimination. The union negotiated a slightly modified policy with the company and I remained on my job.

Between 1979 and 1983 I was laid off due to a general work slow down. When I was called back to work I was transferred to iron pouring. However after a few weeks I was removed again because of the policy and as a result I filed charges of



discrimination and harassment with a state agency. Because of my complaint I was harassed and threatened with discharge. However because of my seniority I transferred to another department and have only worked in iron pouring as a temporary replacement for another worker for three months in 1985.

After the policy was modified all the women were closely monitored for blood lead levels and if their lead level was too high they were either moved to another department where the air lead level was lower or they had to wear respirators. Transfer to another department meant losing about $.45 or $.50/hour in salary. There was also less overtime and weekend work in the low lead departments.

In 1984, two women were removed because they had high blood lead levels and

told they could not return even when their lead level dropped to normal because the air lead level was too high. However again, I was allowed to work their overtime, probably because I had filed the charges. By the end of 1984 I was under a lot of stress. I was always under pressure on my job because of harassment from my foreman. The company had modified its policy somewhat, and other women were allowed to return to high lead areas, but I was not, except as a relief worker. Even after several years, I don't feel that my job in the melting department is secure, because could move me at any time. I also think the policy is psychologically degrading because keeping my job doesn't really depend on whether I'm good at my work or have seniority, but hangs only on whether I can have children.



I liked my job as an iron pourer very much and don't want to work at anything else. However I have not been able to return to this job on a steady basis. The company has no openings in the skilled trades and they are not adding new jobs. There are also no other companies in this area of the state that pay as high a salary and offer such good benefits as the automobile plant.

**STATEMENT OF INTEREST OF ALVA LEWIS**

I have been employed in an automobile plant for twenty-five years, and work in the skilled trades as a millwright. I believe that the plant has always had a policy of testing the blood/lead levels of people who worked in the high lead areas. However, I don't believe this policy was routinely enforced. For example, my brother worked in the foundry and the

melting area melting ore for about twenty-six years, but as far as I know he had only one blood test. In 1978 or 1979, he was tested and had a very high blood/lead level. In 1980 or 1981 he collapsed on the job melting ore (iron) in the melting area.

My brother was forty-four years old when he had the heart attack, and due to the events surrounding his heart attack, I strongly believe his heart attack may very well have been caused by the many years he spent working in the high lead melting area and nearby areas.

When the company enforced its policy with respect to women working in the high lead areas, I was a union Committeeman At Large and at first I thought it was a good idea. However I, and the other representatives, also recognized that the jobs in these areas paid higher wages and



often offered more overtime than jobs in other departments in the plant. After debate and consultation the union decided to support the women because we thought that the policy discriminated against women who wanted and probably needed to work in the high paying jobs to support their families.

The foundry is a very hot and dirty area of the plant and after having fabricated, installed and repaired industrial ventilation systems at this plant for the past twenty-five years, and after having had training in industrial ventilation engineering I am aware that many measures can be taken to improve this workplace. However we have two major problems with achieving this goal. One is after management has spent thousands and even millions to install a system, they

assume the systems will last forever and ignore the need to maintain them. They also allow amateurs who have great authority and no expertise to modify the systems to suit a particular temporary need which soon results in decreasing the efficiency of the system and in some cases nearly destroying it.

**STATEMENT OF INTEREST OF JEANNE PATTERSON**

I began work at the electronics company in 1979. At that time I was married, but we did not have any children. I was a specialist in etching and enjoyed the work very much. It required dexterity and I found it challenging.

When I was hired I wasn't told about any personnel policy regarding pregnant workers, or about hazards in the workplace. But when I became pregnant with my first child, my supervisor told me that I had to



have my doctor sign a form authorizing my working with certain chemicals. Before signing the form my doctor asked me whether I wanted to keep my job. He was the one who told me that if the form was not signed, I would not have a job.

I worked throughout my first pregnancy. But after my maternity leave, I was told that there was no job available for me and that I would be called in when something opened up.

I was finally called back to work and in a few weeks went on graveyard shift. Later I became pregnant a second time and informed my supervisor. This time my doctor refused to authorize my working with chemicals. I was told by personnel that it would be difficult for them to find me another job in the company because my salary was so high and because my skills

were in jobs that involved exposure to chemicals. After a couple of weeks, I was finally offered an interview for a job in another area, but it would have meant taking a 45 percent pay cut.

Financially, my layoff created difficulties. Our rent was raised twice during this time and there were many nights that I stayed awake worrying about paying bills.

After my maternity leave, I called the company and told them I was ready to return to work. After about two months, I was given a job, but with a loss in seniority and a $.75/hour reduction in pay, and a loss of my job title.

**STATEMENT OF INTEREST OF BETTY RIGGS**

I had several jobs prior to working in a chemical plant, but the salary and benefits in those earlier jobs were not as



good. When I heard that the chemical plant was hiring women, I applied immediately.

My son was eight years old when I began working in the plant. At the time my marriage was going very badly and I did not want another child until our relationship improved.

After the company introduced the policy barring fertile women from working in all areas but two, and then several months later just in the high lead areas, the women held several meetings with management. I believe that management pushed sterilization because they made it clear in the meetings that the only form of birth control they considered safe was sterilization. I had asked in one of our meetings whether my husband's vasectomy was adequate protection against my becoming pregnant and was told that it was not.

According to the company's representative, I could still fool around and get pregnant.

I decided to have the sterilization because I needed to keep my job. Management had said that when possible we would be transferred to a safe lead-free department in the factory, but those jobs paid less than what I was currently earning. Besides, I didn't think there were enough jobs available in non-lead departments for all the women, and so I thought there was also the chance that I could be laid off. I don't think I would have been able to manage financially without the higher paying job. By the time the policy was introduced, I knew that my husband and I were going to separate, and that I would have to support myself and my son. In addition, I had always helped my parents who were elderly and infirm and if



I had lost my job I would have had to reduce the amount of my support or even discontinue it altogether.

I was 26 years old when I was sterilized and the realization of what I had done didn't hit me until two or three weeks after the operation. Generally I'd say that I felt less a woman because of the operation. I think that though my marriage was in bad shape, my sterilization made things even worse. My husband was cold, distant and unfeeling about me personally. He just cared about the money I was bringing home. The consequences of the sterilization have even affected my second marriage. Both my second husband and I would have very much liked to have had a child together. In fact I tried to have the operation reversed, but was not successful.

At the plant those of us who had been sterilized were often harassed. In fact I think the harassment became worse after the policy was introduced and it became especially cruel after some of us were sterilized. I overhead four men talking about my operation and they said that I "could have had the surgery done in the carpenter shop," and another supervisor told me "that anybody can screw you now." In addition men called the women "whores" and wrote signs that said for example, "save a job, shoot a woman".

I also think the policy created some friction in the town where the factory was located. Even twelve years after the policy and being laid-off for eight years, I still feel uncomfortable when I attend social activities where I might meet some of my former co-workers, and there are co-



workers or wives of co-workers who refuse to speak to me when we meet.

Statement of Interest of Unnamed
Amici Curiae

**STATEMENT OF INTEREST OF JANE DOE 1**

As soon as I heard that the chemical plant was hiring women, I applied for a job. A few years after I started working, the company introduced the policy barring women from working in certain high lead jobs. I was not in a department where women were barred from working. But we were led to believe that sometime in the future women might be barred from working in all other departments where there were chemicals.

During that time I was always worried about whether my job was safe. I still had payments on my mobile home which I wouldn't have been able to make if I lost my job. Generally, there was no way I could plan

for a future with the policy hanging over my head. I live alone and support myself. After the policy was introduced, the harassment against women in the plant became much worse. Many of the men and supervisors made us feel as though we were less than an animal. When a woman could overhear them, they referred to the sterilizations as "going to the vets."

**STATEMENT OF INTEREST OF JANE DOE 2**

I have worked since I was sixteen years old and held a variety of jobs as a waitress, nurses aide and in a factory. These jobs paid low wages and had limited benefits. I heard from friends that an automobile plant was hiring women, and I was hired in the late summer of 1976. I worked in a high lead area of the foundry. At that time, though no one mentioned that the lead levels were particularly high or



that there was any danger. Because of the policy I had to move to another job. It made no difference that my husband had a vasectomy. This job paid less money than the one in the foundry and I had to work overtime to make up the difference. However, it was a hassle having to keep track of when my overtime came up and how many hours were worked. It was made very clear to me that the only way I could go back and work in the foundry was by getting sterilized.

I was laid off for a few months because of a general slow down in the plant, and I returned to a low lead area in the foundry.

The economic situation in this part of the state is not good. There is only one other factory that perhaps offers comparable benefits, but the pay scale is

lower. Some smaller factories have shut down and the others are not hiring. If I lost my job I would either have to travel at least an hour or more round trip to another city or state, or I would have to take a job as a sales clerk or waitress.

**STATEMENT OF INTEREST OF JANE DOE 3**

I am legally separated and have three children, and receive no child support. A few years ago, I was laid off during the slow season from my job in a paper factory, and a couple of months later when I was supposed to return to work, the company refused to hire me back because I was pregnant.

When I was called back after the layoff, I checked with personnel to make sure about the day I was to return to work. Later that same day, someone from the office called me and told me not to return



to work because I was pregnant. I was told that my job operating the envelope machine was dangerous to my pregnancy because I would be standing for too long. After some time had passed, the company changed their reason and said that in operating the envelope machine I had to stretch a lot and the company believed that would be a strain on me physically. Finally, they told me that the chemicals in the ink printed on the paper were dangerous to my baby.

The job at the paper factory which makes paper products and "novelty" items was the best I ever had. Both the salary and the benefits were better than any I had received on my previous jobs. Before I was laid off I had learned to operate five or six of the seven available machines, and had received a $1.50/hour raise.

When I began earning more money, I took out a personal loan to help me get ahead on some of my other bills. I was still making payments on this loan when I was not rehired, and until I paid up the loan I was very worried that I would fall behind in my loan payments. At this point, I have used all of my unemployment insurance. The factory also discontinued my insurance coverage when I was not rehired. Since March of 1989, I have had no income and no insurance and am currently receiving AFDC.

**STATEMENT OF INTEREST OF JANE DOE 4**

After I graduated from high school I worked part-time in a restaurant while I looked for full-time employment. I am married and have two children. In 1988 I went to a chemical plant to fill out applications for employment. I was told by



the personnel secretary that before I could complete an application I would first have to sign a statement that either I had been sterilized or was past menopause. Since I was unable to sign, I could not apply for a job.

In September, I was called by the union president and told that the factory had changed its policy and that I should reapply. This time I was given an application which included a statement to the effect that I knew about the dangers of lead and if I became pregnant while working at the factory and anything was wrong with the child I would not sue the company. Even though I disliked signing the statement, I did so because I needed the job. But even though I signed, I never heard from them.

This particular company is the highest paying factory in the general area where I live. It pays about three times more than any other place around here.

**STATEMENT OF INTEREST OF JANE DOE 5**

After I moved back to Iowa I applied for work at every factory in my area. One of those companies was a chemical plant, which I know offers the highest hourly wage of any employer in this area. I was not given an application at the personnel office because I was first asked to sign a form stating that I was unable to have children. I told them that I had children and was not planning to have any more, but was told that didn't matter. I would still have to sign and provide proof. I think whether or not I can have or even plan to have children in the future is a private matter. It isn't something the company



should have to know before they decide whether or not to hire me. I refused to sign.

Later in the year I was contacted by the president of the union at the factory and told that things had changed and I could now apply for work. Although this time I was not asked to sign a separate form, the application included a statement similar to the first one. I completed the application but did not sign the statement. It is now over a year since I applied for a job, but the company has never contacted me.

**STATEMENT OF INTEREST OF JOHN DOE 1**

I have worked in the automotive industry for twenty-five years, first in New York, and now in the midwest. During most of those years I worked in the core department where I am exposed to

formaldehyde and other solvents. I am concerned about the exposure to toxic substances because of my personal situation. Only three of my five children are alive. The second child was stillborn. My third child developed cancer early in life and died at age five, and the fourth pregnancy produced twins who were prematurely born. I am convinced that my exposure to hazardous substances in the workplace was the cause of the two deaths and possibly the premature births of the twins.

A lot of men have a hard time relating their chemical exposures to their own health problems or those of their children. Men just assume that during a pregnancy the health of the baby can only be affected by something the mother is exposed to. I also think for economic reasons this issue is a



hard one for many people to take a stand on. The plant where I work isn't hiring any new workers, and all of the men here have ten, fifteen or more years seniority. Some people are afraid that if there is too much pressure put on the company to clean-up the workplace, then the plant will close down. This is what happened in the New York plant where I worked. I have twenty-five years with this company and if this plant was shut down, I know that there is no factory in this area where I could even earn a third of my current salary. You might say that we're sort of caught between a rock and a hard place. Some men prefer to ignore the health issue and just gamble that they or their children won't get sick.

**STATEMENT OF INTEREST OF JANE DOE 6**

I quit high school in the 10th grade, but returned eleven years later and

received my graduation equivalency diploma. After I quit school, I worked for five years as a sales clerk in a variety store. My salary was minimum wage and I received no benefits other than hospitalization. My next job was in a textile factory, but after a while it closed. A year later I heard that they were hiring women at a plant. I applied for the job because it offered a much better salary ($4.25/hour) and better benefits than any of the jobs I had ever had before. Even though the work was strenuous, I enjoyed it. The money and benefits were excellent. A few years after I started, the women were told that management had decided to prohibit all women capable of having children from working in departments where there were dangerous chemicals. Around this time this policy was introduced, I had to have a



total hysterectomy for medical reasons. Other women at the factory were sterilized so that they could keep their jobs. When we went back to our jobs those of us who had been sterilized, no matter what the reason, were recognized by everyone in the plant. The men in the plant knew about the policy and they knew I was sterilized. Some of them harassed me, making jokes and cruel comments. For example, shortly after I returned to work, someone put a can in my locker with the message "you didn't have to have it done in the hospital, you could have had it done in the maintenance shop." Some of the men referred to me as "one of the guys." I was so upset by this harassment that my doctor put me on medication for my nerves.

Eventually those of us who had been sterilized were recognized in town. There

were times when I walked into a store where there were other customers and someone would loudly say here comes "one of them women."

**STATEMENT OF JANE DOE 7**

After six years in low paying jobs, I was hired in the stockroom at a chemical company. The salary and benefits were much better than those I had received before.

I worked at the company for more than a year before I became pregnant. When my supervisor learned that I was pregnant, she told me that I would have to stop working. Because I complained about this policy, I was eventually told that I should get a doctor's authorization to continue working. My doctor said that there was no harm in my working because I was not directly exposed to any dangerous chemicals. However even with my doctor's authorization, I was laid



off without any explanation. Although I collected unemployment insurance during my layoff, I had to pay for my insurance coverage with my employer. Because my insurance was better than my husband's, we decided to continue my policy, but it was financially a burden. During this time I looked for other work but found only occasional jobs, through a temp agency. I was never able to get my old job back after my baby was born, even though I tried.

These last six months have been hard for us. We are fortunate that my husband's parents can help us financially from time to time because we cannot make ends meet every month.

**STATEMENT OF JOHN DOE 2**

I have worked in an automobile plant for several years, and for most of that time I worked in the foundry. In the early

seventies, everyone working in the high lead areas was supposed to have periodic blood tests to determine lead levels. It seems that this requirement wasn't enforced for the men. I know I never had the test.

I was pouring iron when the company introduced its policy requiring all women who worked in high lead areas and whose blood tests showed high lead to transfer to low or lead free areas or to be sterilized if they were still of childbearing age. I supported those women who objected to the policy. I thought that the women I worked with were as capable at their jobs as any man, and I don't think it was right that they were being discriminated against. My impression is that a lot of men felt the same way.



**STATEMENT OF JANE DOE 8**

In 1973, I began working in the foundry of an automobile plant. At the time, I had one small child and when my husband and I separated I needed to find a job with a good salary and benefits. The plant was the only place in the area that offered both and I was hired into the foundry.

In 1973 no one was concerned about exposure to lead. However a few years later, after I had been transferred out of the foundry and to a department where there wasn't any lead, I heard that some of the women in the foundry had been sterilized so that they could keep their jobs. When I was sent back to the foundry, I had to have a blood lead test every three months, and at almost every test the nurse suggested that I have a tubal ligation. I thought

the surgery wasn't necessary because my second husband had a vasectomy. But I was told that it didn't matter whether or not my husband was sterilized. My blood lead levels remained normal so I never had to leave the foundry. I stayed in there for a few years until I had enough seniority to transfer to another department.

The job situation where I live is not good. If I lost my job I would never find anything comparable to what I now have. A woman who is in her late thirties as I am would probably only be able to get a job as a sales clerk in the shopping mall or as a waitress in a fast-food restaurant.

**STATEMENT OF INTEREST OF JANE DOE 9**

My first industrial job was in a garment factory doing piece work. I left there because the wages and benefits were bad and I found another industrial job in a



chemical plant. After five years I was laid off, and it took me eighteen months to find another full-time job. But the chemical company I worked for is the largest industry in my area and pays the best wages, and when I learned that they were hiring new people, I returned there as soon as I could.

I worked in the mixed cast area, mixing rocket propellant. I continued in this department until I became pregnant. i think this plant discriminates against pregnant women. I know of women who were pregnant while working at the plant and the company seems to punish us for being pregnant. One woman who just had a baby was due for promotion and was by-passed. They told her it was because she had been pregnant.

I am now pregnant and am especially worried that when I return from maternity leave, I won't have my old job back. I know that they hired someone else for my position one week after I was transferred to the janitor pool.

I am the major supporter of my family. My husband is presently laid off from his job. My family depends on my salary and benefits, and it would be disastrous for us if I lost my job before my husband is called back to work.

**STATEMENT OF JANE DOE 10**

I started working in the foundry of an automobile plant in 1972. At that time I was married and had two small children.

After I had worked there for about a year, management introduced a policy requiring all women working in high lead areas to have blood lead level tests every



three months. My blood lead level was always low. However the general foreman in the department wanted to get rid of all the women. Those of us who were not sterilized had to wear respirators. I found the respirators very uncomfortable. It's already hot in the foundry and the respirator just makes you hotter. In addition, I couldn't find one that fit me right. The general foreman kept after the women to get sterilized and finally I just decided to have the operation. Looking back, I regret that I did it. I come from a big family and I always wanted more children. At the time I wasn't planning on getting married again and I really needed my job to support the children I already had. But as things happened, I did remarry and both my husband and I wanted a child.